



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
REGIONAL COUNSEL

MAR 18 2011

REQUEST AND DEMAND LETTER
URGENT LEGAL MATTER
PROMPT REPLY NECESSARY
FEDERAL EXPRESS NEXT DAY DELIVERY

Lawrence R. Bencik and Ethel M. Bencik
St Maries Realty
726 Main Avenue
St. Maries, Idaho 83861-9564

Re: Request for Actions, Avery Landing Site, Shoshone County, Idaho

Dear Mr. and Ms. Bencik:

The United States Environmental Protection Agency ("EPA") is providing you with this notice of potential liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA"), and the Oil Pollution Act ("OPA") for the Avery Landing Site located near the town of Avery in Shoshone County, Idaho ("Site"). Records in the possession of EPA indicate that you have been owners of property at the Site since on or before 1996. EPA has incurred, and continues to incur, costs in response to releases and discharges of oil and hazardous substances at the Site. EPA is presently preparing for the implementation of cleanup actions at the Site during the 2011 work season, and in advance of this anticipated work, EPA is interested in obtaining certain commitments from you.

Potential Liability

Under Sections 104(a), 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9604(a), 9606(a) and 9607(a), an owner of contaminated property may be liable for taking action to protect the public health, welfare, or the environment from threats presented by hazardous substances, pollutants or contaminants, and for the payment of costs incurred in conducting cleanup work. In addition, under Sections 311(c) and (e) of CWA, 33 U.S.C. §§ 1321(c) and (e), a private person, including an owner of property, may be liable for taking action to protect navigable waters, adjoining shorelines, and the public health or welfare from threats presented by oil and hazardous substances. Further, under Section 1002(a) of OPA, 33 U.S.C. § 2702(a), a responsible party, including an owner of property, may be liable for the payment of costs incurred to protect navigable waters or adjoining shorelines from threats presented by oil.

Site Work

An assessment by the state of Idaho ("State") in 1991, and a follow-up inspection by EPA in 1993 confirmed that there were ongoing discharges of oil and possibly hazardous substances from the Site to the St. Joe River. Under the oversight of the State, Potlatch Corporation performed some work in an attempt to prevent further discharges to the river. This work was primarily comprised of the construction of free product recovery trenches and the operation of an oil water separator in 1995, and the construction of a vertical barrier containment system and a series of free product collection wells in 2000. Following each these efforts; however, there continued to be discharges of oil and possibly hazardous substances to the St. Joe River.

Based on an evaluation in 2007, EPA determined that an Engineering Evaluation / Cost Analysis ("EE/CA") was needed in order to more fully evaluate the threats presented by oil and hazardous substances at the Site, and to identify the actions which may be taken to abate such threats. As EPA nears completion of the EE/CA process, and prior to the anticipated initiation of removal actions at the Site during the 2011 work season, EPA is interested in obtaining your consent on certain matters. This includes agreement for you to provide: (1) access to your property for the purpose of performing cleanup work; (2) binding restrictions on some uses of your property; and (3) proper maintenance of your property following the cleanup work.

EPA requests that you enter into an administrative settlement agreement which obligates you to the actions identified above. EPA is presently preparing a draft agreement which sets forth proposed terms for accomplishing these objectives and plans to provide you with a draft of the proposed settlement agreement as soon as possible.

EPA is proposing that your participation in the work at the Site be accomplished in accordance with the Policy Toward Owners of Residential Property at Superfund Sites, dated July 3, 1991. A copy of this policy is enclosed with this letter. Under this policy, so long as you are able to provide the type of commitments identified in this letter, EPA may choose to exercise its enforcement discretion by refraining from seeking to require that you provide the payment of costs incurred by EPA for the Site. In this regard, as of July 31, 2010, EPA has incurred costs of approximately \$584,669.95 for the Site, and expects to incur more costs for the upcoming removal actions.

Administrative Record

EPA has begun to establish an administrative record that contains documents which serve as the basis for selection of the cleanup actions. A copy of the current administrative record, including the EE/CA, is available for public review and comment at the Avery Community Center/Library located at 10 Depot Road in Avery, Idaho. Copies of the current administrative record are also available for public review and comment at the EPA, Region 10, offices located at 1910 Northwest Boulevard, Suite 208, in Coeur d'Alene, Idaho, and at 1200 Sixth Avenue in Seattle, Washington. To arrange an appointment in advance of reviewing the copy of the administrative record at the latter location, please contact the Superfund Records Center at (206) 553-4494.

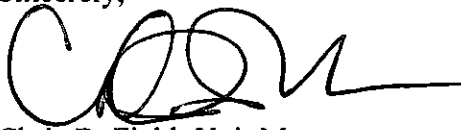
Contacts

The Federal On-Scene Coordinator for the Site is Earl Liverman. EPA is also represented by Richard Mednick, Associate Regional Counsel, in these matters. Mr. Liverman may be reached at telephone number (208) 664-4858 and electronic mail address liverman.earl@epa.gov, and Mr. Mednick may be reached at telephone number (206) 553-1797 and electronic mail address mednick.richard@epa.gov. Please direct all contacts from PC or PFPC regarding the matters raised in this letter to either Mr. Liverman or Mr. Mednick with the caveat that have all contacts from counsel should be directed to Mr. Mednick.

EPA recommends that you give immediate attention to the matters identified in this letter. In this regard, EPA is interested in knowing within ten (10) of the date of this letter whether you are amenable to the general terms of a settlement outlined above.

Thank you in advance for your efforts in this matter.

Sincerely,


for Chris D. Field, Unit Manager
Emergency Response Unit

Enclosure

cc: Earl Liverman
Richard Mednick

OSWER Directive #9834.6

**POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY
AT SUPERFUND SITES**

**U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
Office of Enforcement
Washington, D.C. 20460**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

EC-P-1999-030

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OSWER Directive #9834.6

MEMORANDUM

SUBJECT: Policy Towards Owners of Residential Property at Superfund Sites

FROM: Don R. Clay
Assistant Administrator
Office of Solid Waste and Emergency Response

Raymond B. Ludwiszewski
Acting Assistant Administrator
Office of Enforcement

TO: Regional Administrators, Regions I - X

This memorandum transmits to you the Agency's "Policy Towards Owners of Residential Property at Superfund Sites."

The guidance sets forth the Agency's enforcement policy towards owners of residential property located on a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

This guidance has been developed jointly by the Office of Solid Waste and Emergency Response and Office of Enforcement. The guidance reflects input from the Regions, Office of General Counsel and the Department of Justice. There have been several drafts of this guidance and changes based on comments have been incorporated. We thank you for your assistance.

Attachment

cc: Director, Waste Management Division,
Regions I, IV, V, and VII
Director, Emergency and Remedial Response Division,
Region II
Director, Hazardous Waste Management Division,
Regions III, VI, VIII, and IX
Director, Hazardous Waste Division, Region X
Director, Environmental Services Division,
Regions I, VI, and VII
Regional Counsel, Regions I-X

Received

DEC 02 1999

Enforcement & Compliance Docket
& Information Center

I. INTRODUCTION

A. Purpose and Summary

This guidance describes EPA's policy for enforcement actions to recover response costs or to require response actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), with respect to owners of residential property located on a Superfund site.

Under this policy, EPA, in the exercise of its enforcement discretion, will not take enforcement actions against an owner of residential property to require such owner to undertake response actions or pay response costs, unless the residential homeowner's activities lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site.¹ This policy does not apply when an owner of residential property fails to cooperate with the Agency's response actions or with a state that is taking a response action under a cooperative agreement with EPA pursuant to section 104(d)(1) of CERCLA. This policy also does not apply where the owner of residential property fails to meet other CERCLA obligations, or uses the residential property in any manner inconsistent with residential use.

EPA is issuing this policy to address concerns raised by owners of residential property, and to provide a nationally consistent approach on this issue.

B. Background

Several sites that are the subject of a response action (removal or remedial activities) under CERCLA include properties that are used exclusively as single family residences (one-to-four dwelling units). At several larger sites, soil or ground water contamination may be so extensive that there are several hundred of these residential properties located on a Superfund site.

Some owners of residential property located on a Superfund site are concerned about potential liability for performance of a response action or payment of cleanup costs because they may come

¹ This policy does not provide an exemption from potential CERCLA liability for any party; it is a statement of the Agency's enforcement discretion. Liability is governed by Section 107 of CERCLA.

within the definition of "owner" under the statute.² Owners of residential property located on a Superfund site have expressed the concern that they may be unable to sell these properties because the buyer and the lending institution may also be concerned about potential liability.

C. Past Agency Practice and Basis for Policy

In the past, the Agency has not required owners of residential property located on a Superfund site to perform response actions or pay response costs except where the residential homeowners' activities lead to a release or threat of a release of hazardous substances, resulting in the taking of a response action at the site.³ Despite this general practice, some owners of residential property have asked EPA for individual assurances that the Agency not take an enforcement action against them for performance of the response action or payment of response costs. The Agency has not been able to provide individual owners of residential property with assurances of no enforcement action outside the framework of a legal settlement, and this policy does not alter EPA's policy of not providing no action assurances.⁴

This guidance instead constitutes a general statement of policy regarding the Agency's exercise of enforcement discretion with respect to owners of residential property located on a Superfund site. The purpose of this policy is to continue the Agency's past practice and to provide guidance for Agency enforcement staff.

II. DEFINITION OF KEY TERMS

The following definitions are applicable for the limited purposes of this policy, and do not represent the Agency's interpretation of these or any similar or related statutory terms in any context other than this policy:

² Under section 107(a)(1) of CERCLA, a person is liable if it is the owner or operator of a facility. 42 U.S.C. Section 9607(a)(1). Under section 101(9)(B) of CERCLA, a facility is defined to include "any site or area where a hazardous substance...has...come to be located." 42 U.S.C. Section 9601(9)(B).

³ The Agency has required owners of residential property to provide access to the residential property in order to assess the need for a response action or implement a response action, and to otherwise cooperate with cleanup activities.

⁴ See "Policy Against No Action Assurances," (November 15, 1984).

- o The term "owner of residential property," means a person, as defined under section 101(21) of CERCLA, who owns residential property located on a Superfund site, and who uses or allows the use of the residential property exclusively for residential purposes. The term also includes owners who make improvements that are consistent with residential use. Such term does not include 1) any owner who has conducted or permitted the generation, transportation, storage, treatment or handling of hazardous substances on the residential property other than in quantities and uses typical of residential uses; 2) any owner who disposes of hazardous substances on the residential property resulting in the taking of a response action; and 3) any owner who acquires or develops the residential property for commercial use, or for any other use inconsistent with residential use.
- o The term "residential property," refers to single family residences of one-to-four dwelling units, including accessory land, buildings or improvements incidental to such dwellings which are exclusively for residential use.⁵
- o The phrase "located on a Superfund site" means properties that are within an area designated for investigation or study under CERCLA, listed as a Superfund site on the National Priorities List, identified as the subject of planned or current removal or remedial activities, where hazardous substances have come to be located, or which are subject to or affected by a removal or remedial action.

III. STATEMENT OF POLICY

In implementing CERCLA, EPA may use enforcement discretion in pursuing potentially responsible parties (PRPs) for enforcement actions. It is within the Agency's enforcement discretion to identify appropriate PRPs to perform response actions or pay response costs.⁶

In the exercise of its enforcement discretion, the Agency

⁵ EPA notes that this definition of "residential property" is consistent with the designation for single family residences under the National Housing Act, 12 U.S.C. Section 1701.

⁶ See generally, Heckler v. Chaney, 470 U.S. 821 (1985); U.S. v. Helen Kramer, et al, No. 89-4340 (D.N.J. February 8, 1991).

has determined that it will not require owners of residential property located on a Superfund site to perform a response action or pay response costs if the owner's activities are consistent with this policy.⁷ Under this policy, EPA's exercise of enforcement discretion will extend to lessees of residential property provided that the lessees' activities are consistent with this policy. This policy also applies to persons who acquire residential property through purchase, foreclosure, gift, inheritance or other form of acquisition, as long as those persons' activities after acquisition are consistent with this policy.⁸

This policy does not apply to an owner of residential property who has undertaken activities leading to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site.⁹ In such situations, the Agency would contemplate bringing an enforcement action against the owner of the residential property to perform a response action or to pay response costs. In addition, if an owner of residential property located on a Superfund site develops or improves the property in a manner inconsistent with residential use, or the development of the residential property leads to a release or threat of release of hazardous substances resulting in the taking of a response action at the site, then the owner would not be within the scope of this policy. Also, if an owner of residential property fails to provide the Agency with access to the residential property located on a Superfund site to evaluate the need for a response action or to implement a response action, or fails to comply with any other CERCLA obligations, this policy would not apply.¹⁰

This exercise of enforcement discretion applies to owners of residential property located on a Superfund site who purchased or

⁷ Consistent with the Agency's no action assurance policy (see footnote 4), this policy does not require the Agency to make prospective determinations of whether particular owners of residential property meet the requirements of this policy.

⁸ If the Agency has perfected a federal lien on the residential property prior to the acquisition by the new owner, this policy does not affect the status of that lien.

⁹ The Agency's experience has been that in general, activities which are undertaken consistent with single family residential use do not lead to a release or threat of a release of hazardous substances, resulting in a response action being taken at a site.

¹⁰ See Section IV of this policy for a further discussion of other CERCLA obligations.

sold the residential property in the past or who purchase or sell the residential property after the issuance of this policy. Whether an owner of residential property has or had knowledge or reason to know that contamination was present on the site at the time of purchase or sale of the residential property will not affect EPA's exercise of enforcement discretion under this policy.

This policy is not based on, and has no effect on, the defenses to liability available to an owner of residential property, or any other person, under section 107(b) of CERCLA. This policy is not related to the "innocent landowner defense" described in sections 107(b)(3) and 101(35) of CERCLA; it is based entirely on EPA's enforcement discretion. Thus, the ability of an owner of residential property to assert any defense to liability is unaffected by this policy.

IV. OTHER CERCLA OBLIGATIONS

Although the Agency, in the exercise of its enforcement discretion, will not require owners of residential property to undertake or pay for response actions if the owners' activities are consistent with this policy, to benefit from this policy an owner of residential property must comply with other CERCLA obligations.

To come within the scope of this policy, owners of residential property must provide access to the residential property when requested by EPA, or report information requested by the Agency.¹¹ In addition, owners of residential property must cooperate with EPA and not interfere with any of the Agency's activities on the residential property taken to respond to the release or threat of release. Similarly, owners of residential property must cooperate with and not interfere with the activities of a state that is taking a response action under a cooperative agreement with EPA pursuant to section 104(d)(1) of CERCLA. Moreover, owners of residential property must comply with institutional controls placed on their residential property in order to facilitate performance of a response action and to protect human health and the environment.¹²

¹¹ The Agency has developed guidance which explains the authorities and procedures by which EPA obtains access or information. See OSWER Directive #9829.2, Entry and Continued Access under CERCLA (June 5, 1987). See also OSWER Directive #9834.4-A, Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas (August 25, 1988).

¹² Institutional controls are conditions or limitations commonly placed on property by local or state authorities to ensure that activities (e.g., excavation, construction or other

Nothing in this policy is intended to affect any other obligations required of owners of residential property or any other person under CERCLA or other federal, state and local laws.¹³ EPA reserves its authority to obtain access and to enjoin owners of residential property from interfering with response actions, and to seek recovery of response costs if bringing such actions becomes necessary.

This policy does not change the opportunities available to owners of residential property located on a Superfund site to participate in the response selection process. To the extent such parties wish to receive individual notice of response activities, EPA will provide individual notice of public meetings, public comment periods or other public participation activities to owners of residential property which are on the Agency's community relations mailing list.¹⁴ The eligibility of owners of residential property for Technical Assistance Grants under CERCLA is also unaffected by this policy.

V. PURPOSE AND USE OF THIS GUIDANCE

This policy and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance does not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance or its internal implementing procedures.

VI. FURTHER INFORMATION

For further information concerning this policy, please contact Gary Worthman in the Office of Waste Programs Enforcement at FTS (202) 382-5646, or Patricia Mott in the Office of Enforcement at FTS (202) 245-3733.

similar activity) undertaken by the owner of residential property do not exacerbate the conditions at the site, in some way diminish the effectiveness of a remedy which has been or is being implemented, or otherwise present a threat to human health or the environment.

¹³ For example, if the owner of residential property has knowledge that a release has taken place on the residential property, the owner must notify appropriate authorities.

¹⁴ For each site the Community Relations Coordinator in each Region maintains a community relations mailing list.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

OSWER Directive # 9834.6FS

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FACT SHEET
POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY
AT SUPERFUND SITES

Prepared by the U.S. EPA Office of Solid Waste and Emergency Response, Office of Waste Programs Enforcement, and the Office of Enforcement

EPA ACTION:

EPA is issuing its POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY AT SUPERFUND SITES.

Under this policy the Agency, in the exercise of enforcement discretion, will not take enforcement actions under the Superfund law against an owner of residential property to perform response actions or pay response costs.

PURPOSE:

The Agency is issuing this policy to address concerns raised by owners of residential property located on Superfund sites, and to provide the Regions with a nationally consistent approach on this issue. The guidance sets forth in writing what has been the Agency's past practice towards owners of residential property located on Superfund sites.

BACKGROUND:

Several sites that are the subject of a response action (removal or remedial activities) under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA or Superfund), include properties that are owned and used exclusively as single family residences (one-to-four dwelling units). At several larger sites, soil or ground water contamination may be so extensive that there are several hundred of these residential properties located on a Superfund site.

Some owners of residential property located on Superfund sites are concerned about potential liability for performance of a response action or payment of cleanup costs because they may come within the definition of "owner" under CERCLA. Such owners of residential property have expressed concern that they may be unable to sell these properties because the buyer (or its lending institution) may also be concerned about potential liability.

In the past, the Agency, in the exercise of its enforcement discretion, has not required owners of residential property located on Superfund sites to perform response actions or pay response costs except where the residential homeowner's activities lead to a release or threat of a release of hazardous substances, resulting in the taking of a response action at the site. The Agency has, however, asked owners of residential property to provide access to the residential property and requested that owners abide by institutional controls placed on the property to prevent future releases.

The Agency is issuing this guidance to establish in writing what has been the Agency's past practice. Under this policy, the Agency will continue to exercise its enforcement discretion and will not pursue an owner of residential property to undertake response actions or pay response costs. However, if the owner's activities lead to a release or threat of release of a hazardous substance resulting in the taking of a response action, this policy does not apply, and the Agency will contemplate taking an enforcement action against the owner. Owners of residential property are not within the scope of this policy where they do not use the property for residential purposes or fail to comply with other CERCLA obligations (e.g., provide access or comply with institutional controls placed on the residential property).

The Agency's exercise of enforcement under this policy will extend to lessees of residential property, if the lessees' activities are consistent with this policy. This policy also applies to past owners of residential property as well as future owners of residential property. Whether a person who acquires residential property has or had knowledge or reason to know that contamination was present on the property at the time of purchase or sale of the property will not affect EPA's exercise of enforcement discretion under this policy.

CONTACT:

To receive a copy of the policy, contact the National Technical Information Service (NTIS) at (703) 487-4600 or (800) 336-4700. For more information concerning this policy, contact Gary Worthman in the U.S. EPA Office of Waste Programs Enforcement at FTS (202) 382-5646, or Patricia Mott in the U.S. EPA Office of Enforcement at FTS (202) 245-3733.